SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-520

EARL W. TAYLOR, PRO. PER., *Petitioner*

v.

R. H. MACY & COMPANY, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Dated: September 19, 1973

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PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

Your Petitioner, Earl W. Taylor, a man of 73 years of age and of modest income (without substantial assets), which would permit of the employment of counsel in this matter, hereby appeals to the mercy of the United States Supreme Court, in pro. per. for a Writ of Certiorari to issue to the United States Court of Appeals for the Ninth Circuit which denied Petitioner's appeal frmo an order of the United States District Court (San Francisco, Calif.) in which District Court Petitioner sought relief for alleged violations of the Truth in Lending Act, and Regulation Z, promulgated by the Federal Reserve Board, under authority of Section 1604, Title 15 U.S.C. Jurisdiction was prescribed by Section 1640, Title 15 U.S.C.

Your Petitioner, Earl W. Taylor, pro. per., prays that the writ may issue, upon the grounds set forth in his petition.

Jurisdiction

Jurisdiction in this cause is invoked under the Section 1640 of the Truth in Lending Act 15 U.S.C., and Section 130 of the T. in L. Act, and Section 226.1 (c) of Regulation Z.

Questions Presented

When the Truth in Lending Act, Section 105, designates authority to the Federal Reserve Board to make such differentiations, adjustments, and exception for any class of transactions as in the judgement of the Board are necessary or proper, to effectuate the purposes of this Title, to prevent circumvention thereof, or to facilitate compliance therewith:

And when the Board, in the matter of disclosures of the A.P.R. upon Open End Credit, has made a differentiation from the Section 127 of the Act by the enactment of the Sections 226.7 (b) (6) and 226.5 (a) *et seq.* of Regulation Z, by the elimination of the word *nominal,* from such sections of Z which deal solely with Open End Credit:

(a) May Respondent in the matter of disclosure of Petitioner's Annual Percentage Rate upon Open End Credit, under the above circumstances, exceed the disclosure of the A.P.R. by more than one quarter of one per cent per annum, *the limitation imposed.* Section 226.5 (a) *et seq.* of Z.

(b) May Respondent wilfully understate his finance charge (his periodic rate) and thereafter make only a *nominal disclosure of his periodic rate* — and therefore use as a base for the computation of the A.P.R. the amount he had *disclosed,* rather than the true finance charge (periodic rate) *assessed?*

Law Involved

The Consumer Credit Protection Act, Titles I & IV of the Act of May 28, 1968, Section 1600 *et seq.* Title 15 U.S.C. (Public Law 90-321, Title I & IV Section 130, 82 Statutes 157, May 29, 1969:) This Act known as the Truth in Lending Act.

Regulation Involved

Regulation Z, promulgated by the Federal Reserve Board, under authority of Section 1604, U.S.C. 15 of the Truth in Lending Act. (Designated as Section 105 of the Truth in Lending Act, as appears in the pamphlet issued by the Federal Reserve Board, entitled, *"What You Should Know About Truth In Lending"* – which pamphlet was introduced into the Record of the District Court, on April 27, 1972, and accompanied Petitioner's Appeal to the Ninth Circuit in this matter. 12 C.F.R. 226.

See: [Page 14, Lines 10 to 12, of the Reporter's Transcript at trial in the District Court.]

Opinions Involved

The Opinion of the District Court, pages 92 to 97 of the Record. Also set forth in complete detail, pages AP-2 in the Appendix hereto. (*Appendix B*): This Opinion dated May 8, 1972. This Opinion of the District Court, appears to have not been reported at the time Petitioner searched for such case in the Public Law Library at San Francisco, on August 30, 1973.

The Opinion of the Ninth Circuit Court of Appeals, dated June 27, 1973, which Order denied Petitioner's appeal. This Order is set forth in detail in the Appendix as Appendix C, page AP-9 in the Appendix to this Petition. Such Opinion likewise does not appear to have been reported, perhaps becuuse the Court (Ninth Circuit) has ordered a stay of its mandate. (See Appendix G of Appendix – for good cause shown). See page AP-23 of Appendix.

The order of the Ninth Circuit Court of Appeals, dated 13, August, 1973, which Order denied Petitioner his Motion for rehearing by the Court *in Banc*. This order is set forth in Petitioner's Appendix, as Appendix E. It appears upon page Ap-21 of the Appendix.

The order of the Ninth Circuit Court of Appeals, dated August 23rd, 1973, which denied Respondents (Macys) motion to modify the order of the Ninth Circuit Court of Appeals – which motion is set forth in detail – as Petitioners *Appendix E* and the order of the Ninth Circuit, denying Appellee's motion is also set forth in the Appendix as F, page AP-12.

The order of the Ninth Circuit Court of Appeals, dated August 24, 1973, which order states that for good cause shown, the Mandate of the Ninth Circuit, in connection with their order of June 27th, 1973, which order denied Petitioners appeal, would be stayed, until September 24, 1973, and thereafter, provided Petitioner has filed his petition for *Certiorari* with the Supreme Court of the United States by September 24, 1973, until the Supreme Court has either denied, or ruled upon Petitioner's request for *Certiorari.*

See Petitioner's Appendix G set forth in detail in the Appendix. Page AP-23.

Additional Authority

Letter received from the Federal Reserve System, dated August 21, 1973, included in Appendix as H. Page AP-24.

Abbreviations

A.P.R. is intended to mean the *Annual Percentage Rate.*

F.C. is intended to mean *Finance Charge* (Periodic Rate).

T. in L. is intended to mean the *Truth in Lending Act,* Section 1600 *et seq.* of Title 15 U.S.C.

Z is intended to mean *The Regulation Z,* promulgated by the Federal Reserve Board, under the authority of Section 1604 of the Truth in Lending Act, and Section 105 of the Federal Reserve pamphlet, *What You Should Know About Truth in Lending,* introduced into evidence in this cause. 12 C.F.R. Sec. 226.

Explanation of Petitioners Pleadings

Just prior to the effective date of the Truth in Lending Act, to wit: July 1st, 1969, U.S.C. Title 15, Sections 1600 *et seq.* The Federal Reserve Board, under authority of Section 1604, U.S.C. Title 15, had caused to be mailed to Merchants and Consumers requesting same, a booklet, entitled *What You Should Know About Truth in Lending.*

This booklet was introduced in evidence, (Page 14, lines 10 to 12), Reporters transcript at trial in the District Court (April 27, 1972).

The Book purports to be a copy of The Regulation Z, pages 1 to 21.

The Booklet purports to set forth the Truth in Lending Act, pages 22 to 32 inclusive (Titles I & IV of the Act of May 29, 1968:) (The Consumer Credit Protection Act).

It was not until Petitioner's Petition for *Certiorari* had been sent to the printer, that Petitioner discovered taht through all of his pleadings in the Courts below (both District and Ninth Circuit), he had employed the section numbers as shown in such booklet, that such numbers of such sections did not correspond to the U.S.C. Title 15, numbers given in the U.S. Codes.

Petitioner prays for permission to set forth below, the numbers of the sections, contained in *Z*, upon which this Petition is based, and the numbers of the sections appearing in Title 15, U.S.C. (Sections 1600 *et seq.*)

The Wording of the sections are identical – only the section numbers differ.

Regulation Z numbers pleaded of the Truth in Lending Act	**U.S.C. Title 15 Sec. Nos.**
Section 102	Section 1601
Section 103	Section 1602
Section 105	Section 1604
Section 106	Section 1605
Section 112	Section 1611
Section 121	Section 1631
Section 126	Section 1636
Section 127	Section 1637
Section 130	Section 1640

Statement of the Case

Under provisions of Section 1640, Title 15, U.S.C. and under provisions of Section 130 of the Truth in Lending Act, Petitioner complained to the United States District Court at San Francisco, California, that the Defendant had failed to disclose the Annual Percentage Rate, upon Plaintiff's Open End Credit Account, for the months of July, August, and September of 1971, in accord with the requirements of the Section 226.5 (a) of Regulation Z; and that such rate as had been disclosed to Plaintiff was not computed in accord with the Provisions of Section 226.5 (a) *et seq.*, which sections deal exclusively with Open End Credit; because such disclosure of the A.P.R. understated the Annual Percentage Rate by more than one quarter of one percent per annum.

The case came on for hearing before the Honorable, Judge, Spencer Williams, on April 27, 1972.

At such hearing, Defendant's attorney immediately stipulated in open court, that the disclosed Annual Percentage Rate of 18% per annum had indeed been understated by more than one quarter of one per cent per annum, (the limitation set by Section 226.5 (a) *et seq.*, dealing with Open End Credit disclosures of the Annual Percentage Rate; but Defendant argued that under the provisions of the Section 127 of Truth in Lending they were only compelled to make nominal disclosure of the A.P.R. upon periodic statements given Plaintiff by Defendant for the months in question.

Defendant's stipulations appear of record in the Reporter's Transcript, made at trial (April 27, 1972). They are set forth in the Appendix hereto as *A*. They appear again in Plaintiff's appeal brief to the Ninth Circuit, pages 18, 19, 20. See AP-1

On May 8, 1972, the Honorable Judge Williams issued a Memorandum of Decision which denied Plaintiff the relief he prayed for – and added that Plaintiff should bear his own costs.

The Opinion of Judge Williams is set forth in the Appendix hereto attached as *B*. Such Opinion is also included on pages 92 to 97, in the Record before the Ninth Circuit. See AP-2.

Because Petitioner believed that the District Court had

First: failed to notice and to give effect to the differentiation made by the Board, from the Section 127 of T. in L., by the elimination of the word *nominal* from either the Sections 226.7 (b) (6) and/or Section 226.5 (a) *et seq.*, of Regulation Z, relating to disclosures upon Open End Credit of the A.P.R.

Second: that the Court had failed to understand the converse of the stipulations made by the Defendant's attorneys before the Court at the time of trial, to wit:

Where the number of periods had been set by Defendant at 12; and when the Finance Charge, the Periodic Rate, must be multiplied by such number 12, to compute, determine and disclose the Annual Finance Charge, under Section 226.5 (a), of Z, that the stipulation of Defendant, that the A.P.R. disclosed to Plaintiff understated the A.P.R. *assessed*, by more than ¼% per annum must conversely admit that the Periodic Rate (the Finance Charge), exceeded 1½% per month as disclosed – for in no other manner could the A.P.R. exceed 18% per annum as disclosed, unless the Finance Charge (Periodic Rate) when multiplied by 12, had been understated as well.

Third: That the determination, computation and disclosure of the *Annual Percentage Rate, disclosed, became* the basis of Appellant's periodic statements for the months in question, was not in accord with the provisions of the Section 226.5 (a) of Z, in that the computations of the disclosures, rested upon the amount of the *finance charge disclosed* (which was admittedly understated by the stipulations of Defendant's counsel, when considered conversely. Thereafter, such *disclosed finance charge* (admittedly understated) became the base upon which the disclosures of the Annual Percentage Rate rested. See pages 38 to 56 of Appellant's brief upon appeal.

Fourth: That the District Court had erred in first not considering the differentiation, made by the Federal Reserve Board in Section 226.5 (a) *et seq.* dealing solely with *Open End Revolving Credit* which sections eliminate the word *nominal* while retaining the word *nominal* in the Section 226.5 (b), of Regulation Z, which deals entirely with credit *other than Open End.*

Fifth: And that the District Court further erred by its conclusion of law that the Annual Percentage Rate might be determined, computed and disclosed, based upon the *disclosed amount* of finance charge, and not upon the true amount of *finance charge assessed.*

Petitioner appealed to the U. S. Court of Appeals for the Ninth Circuit. His appeal brief was filed in such court on July 21, 1972. The appeal was docketed as no. 72-2119.

On or about August 13, 1972, Appellee filed his brief, in opposition to Appellant's appeal, with the Ninth Circuit.

Appellee's brief did not controvert a single point, upon which Appellant had set forth in his brief upon appeal.

On June 27, 1973, the Ninth Circuit Court of Appeals issued an order, denying Appellant's appeal, without directly ruling on nor determing the issues set forth in Appellant's appeal brief, to wit:

1) That the Board had made a differentiation from the Section 127, of T. in L. by the elimination of the word *nominal* in the Section 226.7 (6) and Section 226.5 *et seq.* of Regulation Z by the elimination of the word *nominal* from such sections of the Regulation, dealing exclusively with the disclosures required of the A.P.R. on Open End Credit.

2) That the insertion of the word *nominal* into such sections of Z, was so far as Appellant's case before the District Court, and upon which word *nominal* had been inserted into such sections in its opinion of May 18, 1973, in this matter, a question of judicial legislation, by the District Court, and was beyond the legal authority to so insert, and to so rest its opinion.

3) That the District Court, in view of Defendant's stipulations, had lost track of the fact that the A.P.R. had not been computed as required by Z sections 226.7 (6) (b) and 226.5 (a)

And that the District Court, as a consequence had denied Plaintiff to recover his costs of action in District Court.

The Opinion of the Ninth Circuit Court of Appeals, dated June 27, 1973, is attached hereto, in the Appendix, as *Appendix C.* Such Opinion also ignored Appellant's prayer for return of costs. See AP-9

On or about May 11, 1973, this case came on for hearing before the United States Court of Appeals, for the Ninth Circuit.

Under date of ~~July~~ June 27, the Ninth Circuit Court of Appeals, without determination of one solitary point Appellant had raised in his brief upon appeal, issued an order set forth in the Appendix hereto as Petitioner's *Appendix C.* AP-9

The order denied Petitioner's appeal.

On July 11, 1973, Appellant petitioned the Ninth Circuit Court of Appeals *in banc* for rehearing.

On July 13, there was docketed in the United States Court of Appeals, *a motion by Appellee,* to modify its order of July 27, 1973, denying Appellant's appeal (Appendix D). AP-15

Appellant's petition to the United States Court of Appeals, *in banc,* was denied on August 13, 1973. See E in Appendix. AP-21

Appellee's motion for modification of the Court's order of June 27, 1973, was not denied until August 23, 1973 (Appendix F). AP-22

Appellant had appealed to the Ninth Circuit Court of Appeals, *in banc,* to grant rehearing upon the following grounds:

1) That the District Court had failed to notice that the Federal Reserve Board, by their enactment of Section 226.5 (a) *et seq.* had eliminated the word *nominal,* although the Board had employed the word *nominal* in Section 226.5 (b), of Regulation Z which Section 226.5 (b) deals entirely with credit *other than Open End.*

The Ninth Circuit Court of Appeals failed and refused to rule upon such contention of Appellant, raised in his appeal brief.

On July 11, 1973, Appellant petitioned the United States Court of Appeals, *In banc*, for rehearing upon the Court's order of June 27, 1973, which denied Appellant's appeal.

On the same date, Appellee motioned the Court to modify its order of June 27, 1973, which denied Appellant's appeal.

Appellant's petition for rehearing was based upon two facts:

1) **That the Court had not ruled upon the points raised on Appellant's appeal.**

2) **That the order of the Ninth Circuit Court of Appeals contained Judicial errors of law, to wit:**

   a) **The following words, are absolutely contrary to the Regulation Z, Sections 226.7 (a) (4) and 226.7 (b) (8) of Regulation Z.**

   The Court's opinion set forth as C in the Appendix hereto, states as follows: AP-9

   (See page 3, 2nd paragraph, of the printed opinion of the Ninth Circuit, dated June 27, 1973, which denied the appeal of Petitioner, to wit:)

   "Though the language of the disclosure requirement is cumbersome, it essentially requires a full and fair disclosure of the *nominal* annual interest rate, applied in computing *monthly finance charges*, and the disclosure of the amount to which such *nominal* rate will be applied."

See letter, dated August 21, 1973, received from the Board of Governors of the Federal Reserve System, signed by Jerauld C. Kluckman, Accountant-analyst.

This letter is attached in the Appendix as H. AP-24

There is no such permitted by T. in L. or Z, as a *nominal interest rate*.

". . . (Referring to the Section 127 (a) (4) and 127 (b) (5) of the Truth in Lending Act, 15 U.S.C. 1637, require that when an account is opened and on each monthly statement, the creditor must disclose as to its finance charge 'the corresponding *nominal* Percentage Rate determined by multiplying the Periodic Rate by the number of periods in a year. *A similar disclosure requirement is found in the Section 226.7 (a) (4) and Section 226.7 (b) (6) of Regulation Z."*

The Sections of Z quoted above do not demand a similar requirement to Section 127 of the T. in L. Act. In fact the sections quoted of Z use the word "annual" and not the word "nominal" and the Ninth Circuit Court of Appeals has apparently confused each of such words in its opinion.

On page 3 of the Ninth Circuit Court opinion dated June 27, 1973, which denied Petitioner's appeal – and also denied Appellee's motion to modify said judgement, the Court states, to wit:

> "We pass now to the question of whether the disclosures of Appellee meet the requirements of the statute Section 127 (a) (4) and Section 127 (b) (5) of Truth in Lending Act, 15 U.S.C. 1637, require that when the account is opened and on each monthly statement, the creditor must disclose as to its *finance charges* the corresponding *nominal* percentage rate by the number of periods in a year. A similar disclosure requirement is found is Section 226.7 (a) (4) and Section 226.7 (b) (6) of Regulation Z."

The Court is in error because the Sections 226.7 (a) (4) and the Sections 226.7 (b) (6) do not correspond. The Federal Reserve Board, under authority of Section 105 of T. in L. have made a differentiation from the provisions of the Sections 127 (a) (4) and Sections 127 (b) (5) of Truth in Lending, and as a consequence the Ninth Circuit Court of Appeals has misread the word *annual* as the word *nominal* when such word *nominal* does not appear in either section of the Regulation Z above cited by the Ninth Circuit Court.

Page 2, paragraph 2, lines 10 to 12, of the Court's opinion, not as yet reported, but set forth as Exhibit C in Appendix, which relates to the hypothetical set forth in the opinion of the Ninth Circuit Court, dated June 27, denying Petitioner's appeal:

> "Assume the Store's finance charge is computed at 1½% per month (which is the rate actually employed by Macys in the instant case)."
>
> Defendant has already stipulated in open court (conversely) that the rate of finance charge, imposed upon Plaintiff, exceeded the amount of 1½% per month, for in no other way, can the determination of the annual percentage, stipulated by Macys in the Trial Court, have been multiplied by the period number 12, and yet come up with a disclosure of the annual percentage rate (Section 226.5 (a) *et seq.* of Z, far in excess of the ¼% per year limitation, imposed by the Section 226.5 (a) *et seq.* of Regulation Z.

On August 24, 1973, the Ninth Circuit Court of Appeals issued an order *staying the issuance of mandate*, upon its order of June 27, 1973, which order denied Petitioner's (Appellant's) appeal, pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for a writ of *Certiorari* to be made by Appellant; until September 24, 1973. (See G of the Appendix). AP-23

Brief Summary of this Petition for the Writ of Certiorari

The Truth in Lending Act requires disclosures to consumer users of Open End Credit of *both the finance charge* (whether it be called service charge or interest), and the *annual percentage rate.*

The words are not synonymous – different sections of Truth in Lending, and different sections of Regulation Z, which may differentiate from the Act, under provisions of Section 105 of Truth in Lending, each and both set forth different forms to be employed, between the finance charge and the annual percentage rate, with regard to disclosures made to consumers.

Neither the act nor Z is at all interested in the amounts assessed as finance charges, and/or periodic rates, so long as Respondent's disclosure truly represent the amounts assessed.

Respondent employs what is known as the *previous billing doctrine.* Such doctrine is authorized by both Truth in Lending and Regulation Z.

Under this doctrine of billing, respondent has the right to assess any finance charge (periodic rate) he may desire. He may further determine what balance such rate may be assessed upon – and if that balance is determined without consideration of monies received upon the account of Petitioner, such is an accordance with both the Truth in Lending Act, and Regulation Z.

But the right of Respondent to so charge for the financing of Open End Credit, in no way affects the requirements that the finance charge, upon which the annual percentage rate is based be truly stated to Petitioner, in the disclosures given him.

Respondent has disclosed to Petitioner in this case, that:

> "Unless Petitioner paid his alleged balance in full, before the next date of close of the billing cycle that he would be charged *1½% per month* upon such alleged balance – and that payments made after the close of the cycle would not be considered in determining such balance, which would then become his previous balance."

Instead of charging *1½% per month* (even though substantial payments were made within 30 days either from date of purchase, or date of the previous balance upon which the finance charge was assessed and the periodic rate was computed and disclosed), Respondent chose to understate his finance charge, and thereafter used the *disclosed* rate of finance charge, instead of the true rate *assessed* to determine the annual percentage rate to Petitioner.

Thereafter Respondent admitted by stipulation in the District Court, that the annual percentage rate, disclosed to your Petitioner, exceeded the rate of 18% per annum, by more than one quarter of one percent per annum.

Taken conversely, this stipulation also carries an admittance that the monthly finance charge, disclosed as 1½% per month, has exceeded the amount disclosed – for in no other reasonable way can one, using the multiple of 12 (the number of periods, admittedly employed by Respondent) obtain any figure in excess of 18% per annum, beyond one quarter of one percent per annum, as stipulated that they did so exceed the disclosure of the annual percentage rate, in the District Court.

Reasons for Granting the Writ

One

The order of the United States Court of Appeals for the Ninth Circuit appears to be contrary to both the Truth in Lending Act and the Sections of Regulation Z, promulgated by the Federal Reserve Board, under authority of Section 105 of Truth in Lending, which sections of Z deal with the disclosure of the finance charge upon which the computation, determination and disclosure of the annual percentage rate is set forth in Z; in so far as such sections of Z apply to disclosures required upon Open End Credit to consumers, to wit:

The Court states in its opinion that the *nominal* monthly finance charge, may be employed (rather than the true finance charge, monthly *assessed*) to determine the *annual* percentage rates under provisions of 226.5 (a) of Regulation Z.

Nowhere in any section of the Truth in Lending Act, nor in any section of Regulation Z, is there any provision to disclose the monthly finance charge *nominally* – nor thereafter to use such disclosed monthly rate of finance charge *nominally* disclosed, which in this case has been stipulated to have been understated by a considerable amount, as the base for the computation and disclosure of the annual percentage rate, under the provisions of 226.5 (a), dealing solely with Open End Credit.

Such ruling may vitiate the entire Truth and Lending Act, as its purposes are set forth of Section 102 of T. in L., to wit:

"The disclosures must be meaningful."

Two

The order of the Appeals Court, denying Petitioner's appeal, dated June 27, 1973, mistates the Regulations 226.7 (a) (4) of Regulation Z, in the following: and also Section 226.7 (b) (6).

Your Petitioner believes that the word *annual* appearing in such above sections of Z has been hastily read as *nominal* by the Court. Such word *nominal* does not appear in either such section of Z.

Therefore the facts stated in the opinion, to wit:

> **"We pass now to the question of Appellee meeting the requirements of the statute, Section 127, Sections 127 (a) (4) and 127 (b) (5) of the Truth in Lending Act, 15 U.S.C. Section 1637, require that when an account is opened and on each monthly statement, the creditor must disclose as to its finance charge, "the corresponding *nominal* annual percentage rate determined by multiplying the periodic rate by the number of periods in a year." *A similar disclosure requirement is found in the Section 226.7 (a) (4) and Section 226.7 (b) (6) of Regulation Z.***

The quotation above is erronious. Such quoted sections of Z neither one, employ the word *nominal;* instead, each and both of said sections of Z use the word *annual.* The Court appears to have misread such sections of Z. They are not similar to the sections of the Act (127 (a) (4) and 127 (b) (5)) as stated in the Court's opinion denying Appellant and Petitioner's appeal, for the word *nominal* does not therein appear in either of Z.

Three

The Appeals Court has failed to determine the question raised upon Petitioner's appeal, to wit:

> **"Has the Board, under authority of the Section 105, of Truth in Lending, made a *differentiation* from the Section 127 of the T. in L. Act, by the elimination of the word *nominal* in the sections 226.7 *et seq.* and 226.5 (a) *et seq.* of Z (all of which sections deal with the computation, determination, and disclosure of the annual percentage rate *upon Open End Credit* – while retaining the word *nominal* in the section 226.5 (b) of Z, which section deals solely with credit disclosure of the annual percentage rate, on credit *other than open end.***
>
> This question also applies to the Sections 226.7 (a) (4) and Section 226.7 (b) (6) of Regulation Z, as set forth in the order of June 27, 1973, which order denied Petitioner's appeal.

As such question involves the thousands of consumers, employing oper end credit from Respondent, as well as directly affecting your Petitioner, he prays for determination of this point, raised upon his appeal.

Conclusion

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted

EARL W. TAYLOR, pro per
207 Gough Street
San Francisco, CA 94102
Phone: (415) 863-8063

Dated September 19, 1973

Petitioner for the Writ

Earl W. Taylor

Affidavit of Petitioner

Earl W. Taylor, Petitioner pro. per. in this case understands that he is a layman, applying to the mercy of this Court for a Petitioner for Certiorari (attached): that he has no standing in this Court, as a matter of right, and must depend upon the mercy of this Court to be heard in such matter:

And further Petitioner understands that the granting of the Writ of Certiorari is not a matter of right, but a matter solely within the discretion of the United States Supreme Court:

And further, because he believes this matter presents questions to this Court, under the Truth in Lending Act, and Regulation Z, (Federal questions, not heretofore ruled upon by this Court), which affect many consumers in the United States, employing open end credit from Respondent, Petitioner sets forth the affidavit below.

COUNTY OF SAN FRANCISCO }
STATE OF CALIFORNIA } ss

Earl W. Taylor, Petitioner pro. per. in the attached petition for a Writ of Certiorari, addressed to the United States Supreme Court, at its mercy, being known to me and first being duly sworn, deposes and says: That he is the Petitioner named therein; that he does know of his own knowledge that the statements, and the exhibits, are true, and truly represented; except as those matters therein stated upon information and belief, and as to those he does believe them to be true.

EARL W. TAYLOR, *Petitioner*

COUNTY OF SAN FRANCISCO }
STATE OF CALIFORNIA } ss

Subscribed and sworn to, under the penalties of perjury.

SAM PAYTON
Notary Public, San Francisco

Proof of Service by Mail

STATE OF CALIFORNIA }
COUNTY OF SAN FRANCISCO } ss

I, GEORGE MARKOULAKIS, do hereby state under the penalties of perjury:

That I am a citizen of the United States and a resident of the County of San Mateo, State of California; that my business address of 61 Gough Street, San Francisco, California; that I am over the age of eighteen years and that I am not a party to this action or proceeding;

That on September 19, 1973, I caused a copy of the attached Petition to the Supreme Court of the United States for Certiorari together with the exhibits and opinions set forth in the appendix thereto, to be served upon the following named attorneys for respondents, by mail, by placing the United States mail, at the Post Office, at Seventh and Mission Streets, in a sealed envelope, addressed to said attorneys, with postage fully prepaid on both services thereon, a true and complete copy of the Petition referred to above. The Post Office is located in San Francisco, California. Sealed envelopes were addressed to:

SHEPPARD, MULLIN, RICHTER & HAMPTON
458 South Spring Street, Suite 500
Los Angeles, California 90013

and

GARRETT McENERNEY II
500 Sansome Street, Suite 501
San Francisco, California 94111

Dated: September 19, 1973

George Markoulakis

Subscribed and sworn to before me this 19th day of September, 1973.

SAM PAYTON
Notary Public, San Francisco

APPENDIX

Index of Appendix

A Defendant's Stipulations, made in Open Court, on April 27, 1972 [pages 15, 16, and 19, Reporter's Transcript]. These stipulations are acknowledged in the order of the District Court, which appears on pages 92 to 97 of the Record before the Ninth Circuit Court of Appeals. These stipulations were also cited, pages 18, 19 & 20, of Appellant's brief on appeal. AP-1

B The Opinion of the District Court, dated May 8, 1972, which appears in the Record before the Ninth Circuit, on pages 92 to 97.** AP-2

C The Opinion of the Ninth Circuit Court of Appeals dated June 27, 1973, denying Petitioner's Appeal. *** AP-9

D The motion of *Appellee* (Macy's) to modify the Opinion of the Ninth Circuit Court of Appeals, which denied Petitioner's Appeal

E The Opinion or Order of the Ninth Circuit Court of Appeals dated July 13, 1973, which order denied Petitioner's motion for rehearing before the Ninth Circuit Court of Appeals *in banc*. AP-14

F The order of the Ninth Circuit Court of Appeals dated August 23, 1973, which denied *Appellee's* motion to modify the Court's order of June 27, 1973. ..... AP-22

G The Order of the Ninth Circuit Court of Appeals, dated August 24, 1973, granting Petitioner's motion to stay the mandate of the Court, upon its order of June 27, 1973, which denied Petitioner's Appeal; until September 24, 1973, *for good cause shown*. AP-23

H Letter received from the Federal Reserve Board under date of August 24, 1973, which appears to support Petitioner's position in this cause. AP-24

** and *** Neither appears to be reported in the Law Books available to Petitioner, in the San Francisco Law Library.

APPENDIX A
Defendant's Stipulations

Defendant's counsel, open court, at time of trial, April 27, 1972, stipulated as below: [Reporter's Transcript, pages 15, 16, 19]

Mr. Hibner: (Macy's Attorney)

"We are willing to stipulate that some are above some are below. For the purposes of this action, I am willing to stipulate that if he (Plaintiff's Certified Public Accountant witness), were called as a witness he would testify that by analyzing the rates based on the payment dates and all other data we have in the record, he would testify that they came out in excess of 18%."

Mr. Taylor: Plaintiff, Pro. per.

"All right. Now just further than that, will you stipulate that this is more than one quarter of one per cent per annum?"

The Court:

I think the stipulation covers that.

Mr. Hibner:

"You're asking me to stipulate whether or not the difference between what he would testify to as a rate would be more than one quarter?"

Mr. Taylor:

"Yes."

Mr. Hibner:

"So stipulate for the purposes of this action."

See page [19 line 16 to page 20, line 6 of the Reporter's Transcript] made at trial, which was sent on up to the Ninth Circuit.

Again on [page 15, line 25, to page 16, line 6, of the Reporter's Transcript] made at time of trial, attorney for defendant, stipulated as below:

Mr. Hibner: (Macy's Attorney)

"We're willing to stipulate that as to each of the months in question here, just for the purposes of this matter, that Mr. Taylor and his wife were assessed a true finance yield that would have come out to more than 18% because that's not very important."

APPENDIX B

In the United States District Court for the Northern District of California

EARL W. TAYLOR v. R. H. MACY, INC., No. C-71-1821 SW

Memorandum of Decision

Plaintiff Earl W. Taylor, appearing in *propria persona*, brings this action for damages under Title 15 U.S.C. Section 1640, alleging Defendant failed to adequately disclose to him the terms of his "open end" charge account and that such failure constituted a violation of the Federal Truth in Lending Act of 1969 (Title 15 U.S.C. Section 1601 et seq.) and Federal Reserve Board Regulation Z.

Trial was held on April 28, 1972, at the conclusion of which the court found in favor of the Defendant.

Findings of Fact

Plaintiff held an "open end" charge account with Defendant during the months of July, August and September of 1971.

Defendant sets up each credit account on a 30-day billing cycle and uses what is known as the "previous balance method" of computing finance charges. Under this method, no finance charge is assessed on purchases made during the first billing cycle. Rather, the customer is given the option of paying the balance in full within 30 days, in which case no finance charge is assessed. If the customer makes a partial payment during that cycle, a finance charge is computed upon the balance outstanding at the beginning of the subsequent cycle. (The previous month's ending balance is carried forward as the beginning balance of the subsequent cycle.) Purchases made during the subsequent billing cycle are not included in the previous balance upon which the finance charge is computed nor are partial payments (or credits) received during the subsequent cycle deducted from the previous balance upon which the finance charge is computed. In other words, while the balance due for purchases is determined at the end of a cycle (and is reflected on the billing mailed the customer) the finance charge shown on the billing is computed on the balance due at the close of the *previous* cycle. Confusion may thus be caused in the minds of some customers since the finance charge shown on a billing cannot be reconciled with the balance shown *on that same bill.* Finance charges are computed at the rate of 1½% per month on balances less than $1,000 and at the rate of 1% on that portion of the balance that exceeds $1,000.

Plaintiff held an "open end" charge account with Defendant during the months of July, August and September of 1971. On 6/24/71 Plaintiff's outstanding balance was $42.85. During the billing cycle of 6/24/71 to 7/23/71 Plaintiff tendered a payment of $20.00 and was assessed a finance charge of $.64 on the $42.85 owing at the close of the previous cycle. During the billing cycle from 7/24/71 to 8/24/71 Plaintiff made purchases totalling $58.56 and payment of $10.00. The account was assessed a $.35 finance charge on the balance owing at the close of the previous billing cycle ($23.49). During the billing cycle from 8/25/71 to 9/24/71 Plaintiff paid $10.00 toward the previous month's closing balance of $72.40 and was assessed a $1.09 finance charge on the same. The amount owing at the final closing date was $63.49, which amount, plus the $1.09 finance charge on the previous month's balance, was paid by Plaintiff sometime prior to the termination of his account on October 18, 1971.

Plaintiff was mailed statements from Defendant for each of the billing cycles in question. Printed clearly on the front side of each of these statements was the following:

> Any FINANCE CHARGE is determined by applying Periodic Rates of 1½% per month to the first $1,000.00 of the Previous Balance and 1% on such balance in excess thereof, corresponding to ANNUAL PERCENTAGE RATES of 18% and 12% respectively. To avoid Finance Charge on next statement, full payment of new balance must be received by due date shown.

Above this Paragraph in bold capitals, printed in red, appears this instruction:

> **NOTICE – SEE REVERSE SIDE FOR IMPORTANT INFORMATION.**

On the reverse side of the statement is printed the following:

> **If you have not paid the New Balance in full, and special payment terms have not been arranged, the required minimum payment is 1/10th of the New Balance, but not less than $10.00 (or such balance, if less). FINANCE CHARGE is computed on the Previous Balance, which is the amount owed (New Balance) at the end of the prior billing period, without deducting payments and credits, or adding purchases, shown on this statement. Terms of the account are subject to change (consistent with applicable law) which shall become effective not less than thirty (30) days after giving written notice.**

Defendant stipulated at trial that, under the above described billing method, the *actual yield* to Defendant on the finance charges assessed Plaintiff during the months in question represented an amount in excess of 18% per year.

Conclusions of Law

Notwithstanding Plaintiff's unquestionable sincerity and unlagging perseverance in his prosecution of this cause, the court remains uncertain as to the precise theory upon which he relies to support his claim. The complaint, amended complaint, and accompanying briefs are replete with legal conclusions, but lacking clarity as to the factual basis of the claim.

At trial it became apparent that there were actually no facts in controversy. Plaintiff subpoenaed witnesses by whose testimony he would have sought to show that the actual yield on finance charges exceeded, by more than one-quarter of one percent, the nominal rates of 12% and 18% per year. The testimony was obviated, as mentioned above, by Defendant's stipulation as to this fact. Mr. Esquith, Senior Vice President of Defendant was called by Plaintiff. He explained the finance charge aspect of Defendant's billing procedure essentially as outlined in the Findings of Fact, supra. He further testified that Defendant's credit application forms and billing statements were modified in June of 1969 to include the language quoted above for the exclusive purpose of complying with the then recently enacted Truth in Lending Act.

The legal issue, therefore, is reduced to this: Do the disclosures made by Defendant on its monthly statements sent to Plaintiff comport with Federal law and regulation?

Due to the relative infancy of the Act it has not yet been the subject of substantial litigation, and the court has not been directed to, nor has it discovered independently, reported cases dealing with the question now at bar. (Cf. *Ratner* v. *Chemical Bank of New York* Trust Company, 329 F. Supp. 270 (S.D.N.Y. 1971), holding disclosure of the nominal annual rate is required by the Act).

But a careful reading of the Act and Regulation Z convinces the court that far from violating the Act and Regulation, Defendant's form of disclosure is required by them. Section 226.5 (a) (1) (i) of Regulation Z states, inter alia:

> (a) General rule – open end credit accounts. The annual percentage rates for open end credit accounts shall be computed so as to permit disclosure with an accuracy of at least to the nearest quarter of one percent. Such rate shall be determined . . . in the following manner for purposes of disclosure on periodic statements:
>
> > (1) Where the finance charge is exclusively the product of the application of one or more periodic rates ***
> >
> > > (i) By multiplying each periodic rate by the number of periods in a year; or . . .

Title 15 U.S.C. Section 1637 provides that the creditor shall disclose on each periodic statement the following:

> If the balance is determined without first deducting all credits during that period, that fact and the amount of such payments shall also be disclosed.

Plaintiff has failed to illustrate how Defendant's disclosures fall short of these requirements.

The difficulty in attempting to disclose with perfect accuracy the actual yield from the finance charges for a twelve month period lies in the fact that the amount the creditor ultimately realizes as a result of the finance charges is dictated in part by the consumer's own choice of when he makes payments on his outstanding balance. Under Defendant's billing plan there is no yield if the consumer pays the full amount owing within thirty days. There is a yield, of course, in the case of partial payments with those made early in the billing cycle resulting in a greater yield to the Defendant than those made late in the cycle.

Congress recognized the impossibility of forecasting precisely the ultimate actual yield on open end credit accounts, and accordingly provided that the required disclosures need reflect only the *nominal* annual rate of the finance charge. This method is expressly mandated by Section 226.5 (a) (1) (i) of Regulation Z and has been approved by the Federal Trade Commission (Consumer Policy Statement Number Four, May 7, 1970, CCH Consumer Guide Report, paragraph 30, 369) as well as by the Federal Reserve Board (Federal Reserve Board Letter of January 14, 1972, by J. L. Robertson, CCH Consumer Credit Guide, paragraph 30, 793).

It is therefore the Judgement of the court that Plaintiff has failed to sustain his burden of proving any violation of the Federal Truth in Lending Act of Regulation Z by the Defendant.

It is further Judgement of the court that the parties shall bear their respective costs in this litigation.

Dated: May 8, 1972.

SPENCER WILLIAMS
United States District Judge

APPENDIX C

United States Court of Appeals
for the Ninth Circuit

EARL W. TAYLOR, Plaintiff-Appellant v. R. H. MACY, INC. Defendant-Appellee, No. 72-2119. Opinion.

(June 27, 1973)

On Appeal from the United States District Court for the District of California

Before: MERRILL and HUFSTEDLER, Circuit Judges, and HILL*, District Judge

HILL, District Judge:

In this action, the Appellant Taylor (Plaintiff below) challenges the method by which Appellee R. H. Macy & Company, Inc. (Defendant below) computes charges on unpaid balances in its customers' revolving charge accounts. Appellant claims that Appellee is violating the Truth in Lending Act, 15 U.S.C. Section 1601 ff., and Regulation Z of the Federal Reserve Board, issued persuant to the Act, 12 C.F.R. Section 226. Appellee's method of computing finance charges is commonly referred to as the "previous balance" method.

Appellant is not an attorney and appears in pro per. His contentions are not stated with complete clarity in his brief. He appears to contend first, that the previous balance method is not sanctioned by the Act and the Regulation, and second, if the method is sanctioned, Appellee's disclosures to its customers do not meet the standards of the Act and the Regulation. The trial Court found Appellant in both respects as do we.

*Honorable Irving Hill, United States District Judge for the Central District of California, sitting by designation.

The facts were not in dispute at the time of trial and are not in dispute before us. The sole question presented is one of law. This appears to be a case of first impression.

It is worthwhile to illustrate what the previous balance method is, and how it operates, by stating a hypothetical example. Assume a charge account to have been opened June 1 with purchases of $50 on June 1 and $50 on June 15. Assume no payments were made during June. As of June 30, the balance due would be $100. In the subsequent month, that balance is referred to as the "previous balance." Assume further that during the month of July, payments of $50 were made and new charges of $100 were incurred. The balance at the end of July would be $150, which is called the "new balance." Assume that the store's finance charge is computed at 1½% per month (which is the rate actually employed by Macy's in the instant case). A finance charge of $1.50 would also be imposed on the billing at the end of July. This finance charge is not imposed on the new balance but is imposed on the entire previous balance of $100, despite the fact that a part of that $100 balance, which was due on June 30, was paid during the month of July. Under the previous balance method, the finance charge is imposed on *all* of the previous balance unless *all* of it has been paid in the following month. If all of it is paid in the following month, no finance charge is imposed.

The above hypothetical presents the controversy involved in the instant case although the figures of charges and payments

are different. Appellant makes much of the fact that the finance charge is imposed on the entire previous balance even though some payments were made in the month following its rendition. He correctly points out that the effective rate of interest is much more than the nominal rate of 1½% per month where, as in the hypothetical, a substantial payment was later made.

Section 107 (a) (2) of the Truth in Lending Act, 15 U.S.C. Section 1606, provides with respect to open end credit that the annual percentage rate shall be determined:

> "as the quotient (expressed as a percentage) of the total finance charge for the period to which it relates divided by the amount upon which the finance charge for that period is based, multiplied by the number of such periods in a year."

Appellant can point to no legislative history or other authority to support his contention that the previous balance is not sanctioned under the Act and Regulation Z[1]. To the contrary, it seems abundantly clear that both the Act and the Regulation envisage and approve the previous balance method, as burdensome and expensive as that method is to the customer. See particularly 15 U.S.C. Section 1637 and Section 226.5 (a) (1) (i) of Regulation Z. Our construction is reinforced by the fact that both the Federal Trade Commission and the Federal Reserve Board have interpreted the statute and regulation as authorizing the previous balance method. See FTC Consumer Policy Statement No. Four of May 7, 1970, CCH Consumer Guide paragraph 130,369, and Federal Reserve Board letter of January 14, 1974, CCH Consumer Credit Guide paragraph 130,793. Both of those agencies are given important interpretive and enforcement powers under the statutory scheme and their interpretations are entitled to substantial weight. It would thus appear that any action to outlaw the previous balance method under Federal law must come from Congress.

We pass now to the question of whether the disclosures of Appellee meet the requirements of the statute. Section 127, Sections 127 (a) (4) and 127 (b) (5) of the Truth in Lending Act, 15 U.S.C. Section 1637, require that when an account is opened and on each monthly statement, the creditor must disclose as to its finance charges "the corresponding nominal annual percentage rate determined by multiplying the periodic rate by the number of periods in a year." A similar disclosure requirement is found in Section 226.7 (a) (4) and 226.7 (b) (6) of Regulation Z. Although the language of the disclosure requirement is cumbersome, it essentially requires a full and fair disclosure of the nominal annual interest rate applied in computing monthly finance charges and the disclosure of the amount to which said nominal rate will be applied. We quote below the disclosures actually made by Appellee in connection with the opening of Appellant's account and in its monthly statements to Appellant[2]. We agree with the trial Judge that these disclosures fully meet the requirements of both the statute and the Regulation. The nominal rate is correctly disclosed as being 18% (of the first $1,000 of the previous balance) as is the fact that this rate is imposed on the entire previous balance. The dismissal of the complaint after trial by the Court below is affirmed.

[1]Regulation Z has been recently held valid by the Supreme Court. *Mourning v. Family Publishing Service, Inc.* ..... U.S. ..... (April 24, 1973).

[2]The following disclosure was made to Appellant at the time he applied for his charge account:

". . . If full payment of the closing balance (New Balance) of a billing period is received by Macy's before the close of the next billing period, no Finance Charge will be added in the billing period in which full payment is received. In each billing period (current period) in which full payment of the New Balance of the previous billing period is not received, a Finance Charge may be imposed, computed on the Previous Balance of the current period (New Balance of the previous period), without deducting payments and credits of adding purchases made in the current period.

"The Finance Charge is computed by applying periodic rates of 1½% per month to the $1,000.00 of the Previous Balance and 1% to such balance in excess of $1,000.00 corresponding to Annual Percentage Rates of 18% and 12% respectively . . ."

Printed clearly on the front side of each of the statements sent by Appellee to Appellant was the following:

> "Any FINANCE CHARGE is determined by applying Periodic Rates of 1½% per month to the first $1,000.00 of the Previous Balance and 1% on such balance in excess thereof, corresponding to ANNUAL PERCENTAGE RATES of 18% and 12% respectively. To avoid Finance Charge on next statement, full payment of new balance must be received by due date shown."

Above this paragraph in bold capitals, printed in red, appears this instruction:

> "NOTICE – SEE REVERSE SIDE FOR IMPORTANT INFORMATION"

On the reverse side of the statement is printed the following:

> "If you have not paid the New Balance in full, and special payment terms have not been arranged, the required minimum payment is 1/10th of the New Balance, but not less than $10.00 (or such balance, if less). FINANCE CHARGE is computed on the Previous Balance, which is the amount owed (New Balance) at the end of the prior billing period, without deducting payments and credits, or adding purchases, shown on this statement. Terms of the account are subject to change (consistent with applicable law) which shall become effective not less than thirty (30) days after giving written notice."

APPENDIX D

United States Court of Appeals
for the Ninth Circuit

No. 72-2119

EARL W. TAYLOR
Plaintiff-Appellant

v.

R. H. MACY & COMPANY, INC.
Defendant-Appellee

(1) Motion to Modify Opinion

(2) Affidavit of Don T. Hibner, Jr. in Support Thereof

To the Honorable Judges Merrill and Hufstedler, Circuit Judges, and the Honorable Irving Hill, United States District Judge, sitting by designation:

Defendant-Appellee R. H. Macy & Company, Inc. hereby moves for an order modifying the opinion of the Court in the above matter, filed on June 27, 1973, in each of the following particulars:

(a) Strike the following language appearing on page 3, at pages 7 - 10:

"He correctly points out that the effective rate of interest is much more than the nominal rate of 1½% per month where, as in the hypothetical, a substantial payment was later made."

(b) Insert in lieu of the above the following:

"He correctly points out that in the transactions involved in this case, the effective rate of finance charge is more than the nominal rate of 1½% per month. The nominal rate may or may not be exceeded in any given hypothetical, depending on the amount of payments made, the date of the payments, and the amount and dates of any purchases made during the billing cycle."

(c) Strike the following language appearing on page 4, at line 19:

"interest rate . . ."

(d) Insert in lieu of the above the following language:

"percentage rate . . ."

This motion is made upon the ground that the above requested modifications are necessary in order to comport to the facts in the record, and to incorporate in the opinion the precise language used by Regulation Z. This motion is supported by the Affidavit of Don T. Hibner, Jr., which is attached herewith and incorporated herein by this reference, and by the other documentary materials of record.

AFFIDAVIT OF DON T. HIBNER, JR. IN SUPPORT OF MOTION TO MODIFY OPINION

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES ss.

I, DON T. HIBNER, JR., being first duly sworn, depose and say as follows:

1. I am a member of the law firm of Sheppard, Mullin, Richter & Hampton, and one of the attorneys of record for the Defendant-Appellee R. H. Macy & Company, Inc. ("Macy's") herein. I make this Affidavit in support of Macy's motion to modify the opinion in this matter, filed by the Clerk on June 27, 1973. If called as a witness in this proceeding, I could give competent testimony to the matters contained herein.

2. In this action, Appellant Taylor claims that Macy's is in violation of the Truth in Lending Act, 15 U.S.C. Section 1601, et seq. and Regulation Z of the Federal Reserve Board. As part of his claim that improper disclosures have been made, Appellant Taylor urges that the method of computing finance charges on revolving charge accounts utilized by Macy's, commonly referred to as the "previous balance" method, is not sanctioned by the Truth in Lending Act, or by Regulation Z.

WHEREFORE, Petitioner respectfully prays that its motion as set forth above be granted.

DATED: July 11, 1973.

SHEPPARD, MULLIN, RICHTER & HAMPTON

By DON T. HIBNER, JR.
Attorneys for R. H. Macy & Company, Inc.
Defendant-Appellee

3. The case does not involve any issue relating to whether finance charges imposed on revolving charge accounts constitute "finance charges," or "interest." It deals solely with whether the disclosures of annual percentage rates as contained in the periodic statements sent to Mr. Taylor were in accordance with the provisions of the Truth in Lending Act, and Regulation Z. There is now pending in the Los Angeles Superior Court a series of cases where an issue is whether finance charges constitute the loan or forbearance of money, pursuant to Article XX of the California Constitution, or whether finance charges are exempt therefrom as being within the traditional time-price doctrine developed by a series of Appellate Decisions of the California Courts. The pending cases have been consolidated for all purposes and are now pending in Department 36 for pretrial procedures as outlined in the recently promulgated Class Action Manual. The lead action is entitled *Ronald J. Fox v. Fedco, Inc. a corporation*, Los Angeles Superior Court, No. 992,897.

4. The use of the term "interest" on line 8 of page 3 of the Opinion, and again at line 19 on page 4 of the Opinion in this action, could be confusing and possibly prejudicial in the resolution of these pending state cases. Accordingly, it is respectfully submitted that such possible confusion and prejudice could be best eliminated by utilizing the terminology of Regulation Z itself. For example, Section 226.7 (b) (6) of Regulation Z uses the term "annual percentage rate." Nowhere in Regulation Z is the term "interest" used.

5. On page 2 of the Opinion, beginning on line 12, a hypothetical example is given illustrating the operation of the previous balance method. The hypothetical assumes purchases of $100.00 in June. As the account is a new one, there is no "previous balance" as of the end of the billing cycle, and no finance charge is assessed. The hypothetical correctly points out that the ending balance of the prior cycle now becomes the "previous balance" for purposes of assessing finance charges at the end of the current cycle. In this subsequent month, payments of $50.00 are made, and new charges of $100.00 are made. The hypothetical does not give the dates of either the partial payment, or the new purchases. The Opinion correctly points out that the finance charge for the end of the second cycle is based on the previous balance of $100.00 and not on the ending balance of that month – $150.00.

6. On page 3 of the Opinion, beginning at line 12, it is stated:

> "He (Taylor) correctly points out that the effective rate . . . is much more than the nominal rate of 1½% per month where, *as in the hypothetical, a substantial payment was later made.*" (emphasis added)

At trial it was stipulated that as to the periodic statements sent Mr. Taylor, the finance charges would exceed the nominal percentage rate of 18%. This stipulation was for the purposes of this action only, and was limited to the Taylor periodic statements received in evidence. (See Reporter's Transcript, April 27, 1972 at pages 15 - 16.) However, in the hypothetical set forth in the Opinion, the finance charge, in most instances, will be less than a nominal percentage rate of 18%. The rate would be a function of the payment and purchase dates. Accordingly, it is respectfully submitted that the language quoted in paragraph (a) of the motion be stricken and the suggested language of paragraph (b) inserted in lieu thereof.

DON T. HIBNER, JR.

Subscribed and sworn to me
this 11th day of July, 1973.

SHIELA Y. CANTRELL
Notary Public–California

Certificate of Service

The undersigned hereby certifies that one copy of Motion to Modify Opinion and Affidavit of Don T. Hibner, Jr. in Support Thereof in this action has this day been served by mail upon the following party to the action:

Mr. Earl W. Taylor
207 Gough Street
San Francisco, California 94102

Dated at Los Angeles, California this 11th day of July, 1973

Subscribed and sworn before me
a Notary Public on July 11, 1973

SHIELA Y. CANTRELL

APPENDIX E

The United States Court of Appeals for the Ninth Circuit

EARL W. TAYLOR
Plaintiff-Appellant

v.

R. H. MACY & COMPANY, INC.
Defendant-Appellee

No. 72-2119

On Petition for Rehearing

Before: MERRILL and HUFSTEDLER, Circuit Judges, and HILL, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing *in banc*.

The full court has been advised of the suggestion for an *in banc* hearing, and no judge of the court has requested a vote on the suggestion for rehearing *in banc*. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing *in banc* is rejected.

APPENDIX F

**In the United States Court of Appeals
for the Ninth Circuit**

EARL W. TAYLOR
Plaintiff-Appellant

v.

R. H. MACY & COMPANY, INC.
Defendant-Appellee

No. 72-2119

Order

Before: MERRILL and HUFSTEDLER, Circuit Judges, and HILL, District Judge

Appellee's motion for modification of opinion herein is denied.

APPENDIX "G"

United States Court of Appeals
in the Ninth Circuit

EARL W. TAYLOR
Plaintiff-Appellant

v.

R. H. MACY & COMPANY, INC.
Defendant-Appellee

Order Staying Issuance of Mandate

Upon application of Earl W. Taylor pro per, counsel for the Appellant pro per, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41 (a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgement of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellant herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before September 24, 1973.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

CHARLES M. MERRILL
United States Circuit Judge

Dated: San Francisco, Calif.
August 24, 1973

APPENDIX H

BOARD OF GOVERNORS
of the
FEDERAL RESERVE SYSTEM
Washington, D. C. 20551

Division of Supervision and Regulation
August 21, 1973

Mr. Earl W. Taylor
Discount Printing Co.
P. O. Box 6080
San Francisco, California 94101

Dear Mr. Taylor:

Mr. Garwood has asked that I respond to your letter of August 14, 1973, relating to Regulation Z. The term "periodic rate" is defined in Section 226.5 (u) of Regulation Z as a "percentage rate of finance charge which, under an open end credit plan, is or may be imposed by a creditor against a balance for a period." Your letter indicates that there are instances in which merchants disclose one periodic rate but assess another periodic rate which is greater than the periodic rate disclosed. I would suggest that you report evidence of any such cases to the Federal Trade Commission, since that office is responsible for enforcing Truth in Lending with respect to merchants.

There are no provisions in either the Act or Regulation Z relating to the disclosure of a "nominal" finance charge, as there are with respect to the disclosure of a "nominal" annual percentage rate.

Sincerely,

JERAULD C. KLUCKMAN
Accountant-Analyst